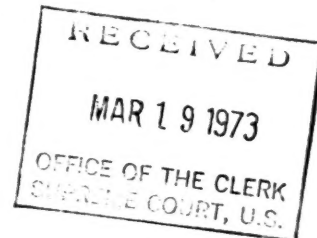


WILLIAM R. EDWARDS
HUBERT L. STONE
JAMES DEANDA
DAVID L. PERRY

J. ROBERT MCKISSICK
ROBERT E. BRUNKENHOEFER
CALVIN W. SCHOLZ

EDWARDS, STONE & DEANDA
ATTORNEYS AT LAW
P. O. DRAWER 480
CORPUS CHRISTI, TEXAS 78403

March 16, 1973



12th FLOOR WILSON BUILDING
TELEPHONE: (512) 882-2637

Hon. Michael Rodak, Jr.
Clerk, United States Supreme Court
Washington, D.C. 20543

Re: Logue v. United States
No. 72-656

Dear Mr. Rodak:

In reading over the Brief of Petitioners previously filed with the Court, I have noticed the following typographical errors. Reference to 18 U.S.C. § 4042 has mistakenly been printed as 28 U.S.C. § 4042 on the following pages: Subject Index, Argument, paragraphs b. and e.; pages 6, 7, 8, 14 and 26. On page 7, line 4 "case" should read "care". On page 14, last line, 18 U.S.C. § 2671 should read 28 U.S.C. § 2671.

I deeply regret this inadvertence and would appreciate your directing the Court's attention to these corrections.

Thank you for your consideration.

Very truly yours,

EDWARDS, STONE & DE ANDA


J. Robert McKissick

cc: Solicitor General
Department of Justice
Washington, D.C. 20530

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- cc: Solicitor General
Department of Justice
Washington, D.C. 20530
- cc: Mr. Ed Idar, Jr.
Mexican-American Legal Defense Fund
319 Aztec Building
San Antonio, Texas
- cc: Mr. Mario Obledo
Mexican-American Legal Defense Fund
145 9th Street
San Francisco, California 94102

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-656

ORVAL C. LOGUE, individually and as personal
representative of his deceased son, Reagan Logue,
and ALICE MARIE BLOUIN, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF PETITIONERS

Orval C. Logue, individually, and as personal representative of his deceased son, Reagan Logue, and Alice Marie Blouin, the natural mother of Reagan Logue, present to this Honorable Court their brief on the merits in support of the question presented in their petition for writ of certiorari granted by the Court on January 8, 1973.

OPINIONS BELOW

The district court's memorandum opinion (A. 607), awarding Petitioners recovery under the Federal Torts Claims Act, is reported at 334 F.Supp. 322. The opinion of the court of appeals (A. 616) reversing the district court is reported at 459 F.2d 408 and the subsequent order of that court denying rehearing en banc and the opinion dissenting from such order (A. 624) is reported at 463 F.2d 1340.

JURISDICTION

The decision of the court of appeals denying Petitioners' motion for rehearing en banc was entered on July 31, 1972. The petition for writ of certiorari was docketed with the court on October 28, 1972 within ninety (90) days after the entry of such final judgment as provided by 28 U.S.C. § 2101(c). The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act (28 U.S.C. §§ 1346 (b) and 2671) are set forth in Appendix, Vol. III, at page 631. The statute imposing on the United States the duty to safely keep, care for and protect federal prisoners (18 U.S.C. § 4042) is reproduced in Appendix, Vol. III at page 633. The statute authorizing the United States to contract with non-federal governmental authorities for the detention of federal prisoners (18 U.S.C. § 4002) is set forth in Appendix, Vol. III at page 634.

QUESTION PRESENTED

This case presents the issue of whether the United States may exempt itself from liability under the Federal Tort Claims Act for injuries negligently caused to a federal prisoner by relinquishing supervision over the prisoner to a local county jail pursuant to a contract providing for housing federal prisoners in the jail.

STATEMENT OF THE CASE

The decedent, Reagan Logue, was arrested by a Deputy United States Marshal, May 22, 1968, on a bench warrant issued by United States District Judge Ben C.

Connally out of the Laredo Division of the Southern District of Texas, charging him with conspiracy to smuggle marijuana into the United States. Logue was placed by the Deputy Marshal in the Nueces County Jail at Corpus Christi, Texas, as a federal prisoner. At the time Logue was eighteen years of age. (A. 593).

The next day Logue attempted suicide while confined in the jail by cutting his left arm with a razor blade. When the Nueces County Jailer, Tom Lowrance discovered this, he had Logue taken to Memorial Hospital in Corpus Christi and immediately tried to contact the United States Marshal. (A. 419, 421).

On admission to the hospital, Logue was diagnosed as acutely psychotic, and after being treated for his injury, he was heavily tranquilized and placed in a special, locked room in the psychiatric unit of the hospital to prevent him from again attempting suicide. (A. 111-112). Both psychiatrists that attended him at the hospital felt his mental condition was such that another suicide attempt was likely. (A. 114, 166-167).

In the meantime, Lowrance, unable to contact the United States Marshal, asked Howard Vaught, the local federal probation officer to assist him. After several unsuccessful telephone attempts, Vaught finally talked to Casey Slocomb, Chief Deputy United States Marshal in Houston, Texas. (A. 254). Slocomb requested Vaught to instruct the jailer to place guards over Logue at the hospital around the clock. Lowrance was further instructed by Slocomb that Deputy Marshal Bowers would take charge of the situation when he returned to Corpus Christi. (A. 96, 323). Bowers learned of Logue's suicide attempt from Lowrance at 8:30 a.m. on May 24, 1968, and went to the hospital to check on Logue's condition. (A. 322-323). There

he talked to the psychiatrists who informed him of Logue's mental condition and recommended that Logue remain in the hospital to prevent another suicide attempt. (A. 114, 119, 160, 326-327, 330).

Thereafter Bowers contacted his supervisor in Laredo, Texas, Deputy Marshal Jones, who advised him to keep guards at the hospital if necessary at federal expense. (A. 330-332). Based on Dr. Gwin's suggestion, as well as Logue's attorney, Marvin Foster, Jones contacted Assistant United States Attorney Ronald Blask and they requested that Judge Connally enter an order committing Logue to the federal medical center at Springfield for psychiatric examination pursuant to 18 U.S.C. § 4244. After discussing the situation with Blask and Jones, Judge Connally agreed to enter the Order. (A. 330-331, 379-383).

Bowers again contacted Chief Deputy Slocomb who advised him that Logue should be returned to the jail if a safe place could be arranged for his confinement. After again talking to Jones in Laredo, arrangements were made to obtain a solitary cell at the jail. (A. 332, 333). Jones also contacted Lowrance at the jail and gave him instructions regarding Logue's confinement at the jail. (A. 383-388).

Bowers went to the jail and inspected the cell, then contacted Dr. Gwin, Logue's treating doctor (A. 148, 155-156) and advised him that he had inspected the cell and in his judgment Logue would be safe there and that Judge Connally's order would be forthcoming so that Logue could be removed to a federal institution as soon as possible. (A. 336). Dr. Gwin noted on Logue's progress report "U. S. Marshal told patient should remain here until transfer to another hospital, but Judge Connally ordered him returned to jail." In compliance with the orders received from the

Marshal and against his recommendation, and Dr. White's, Gwin released Logue from the hospital. (A. 165-167, 119).

Deputy Marshal Bowers testified that it was not his decision to make whether Logue remained in the hospital and that he had been instructed by his superiors not to take Logue out of the hospital unless he had a release from Dr. Gwin. (A. 341, 343). Deputy Marshal Jones testified that Deputy Marshal Bowers had told him it would not be safe to leave Logue in the hospital without guards and that he told Bowers that "it was his responsibility" and that Bowers should find some guards since it was his problem and he was on the scene. (A. 378). Later Jones told Bowers to call the doctor and advise him there was a commitment order pending, that they wanted to move the prisoner back to jail and in the event the doctor did not deem it advisable to give a release, he was to leave the prisoner in the hospital and advise Chief Deputy Slocomb. (A. 385).

Deputy Marshal Bowers returned Logue to the jail and noted on his daily log for May 24, 1968 "[c]ommitted Logue to Nueces County Jail, instructed jail personnel as to security for the above prisoner." (A. 366). Pursuant to the Marshal's instructions all movable objects were taken out of the cell, leaving only the commode, faucet and wash basin, and mattress on the metal bunk. In addition Logue's clothes were removed, except his shorts, and he was watched periodically by the jailers. (A. 445). About 4:45 p.m. on May 24, 1968, one of the jailers found Logue had hanged himself with the long Kerlix bandage that had been used to bind his wound after his first suicide attempt. (A. 450, 480). After trial, the district court held that the Deputy U. S. Marshal was negligent in failing to make specific arrangements for the constant surveillance

of the prisoner; that the jail employees were negligent in failing to keep the prisoner under constant surveillance; and that the United States government was liable for both these acts of negligence under the Federal Tort Claims Act. (A. 607). The court of appeals reversed, holding that (a) the Deputy Marshal had no authority or power to control the internal functions of the Nueces County jail and, therefore, had no duty to make specific arrangements for the prisoner's constant surveillance; and that (b) 18 U.S.C. § 4002, authorizing the United States to contract with non-federal governmental authorities for the detention of federal prisoners, fixed the status of the Nueces County jail as that of a "contractor," thereby insulating the United States from liability for the negligence of the jail's employees under the Federal Tort Claims Act, 28 U.S.C. § 2671. (A. 616). Chief Judge Brown, with whom Circuit Judges Goldberg and Wisdom joined, filed an opinion dissenting from the denial of rehearing en banc. (A. 624).

SUMMARY OF ARGUMENT

The United States Marshal pursuant to 28 U.S.C. § 4042 was under a duty to protect all federal prisoners. He was negligent in reincarcerating Reagan Logue under circumstances that he knew were inherently dangerous. This act of negligence was separate and apart from any negligence on the part of the Nueces County jailer. Whether or not he had either the legal or actual authority to control the internal functions of the jail is irrelevant to the Marshal's failure to use reasonable care in discharging this duty.

In addition, this duty was non-delegable. In choosing the Nueces County jailers to carry out his duty to keep

Reagan Logue under constant surveillance, they in effect became his employees. Congress expressed its intent in 28 U.S.C. § 4042 that the Attorney General shall protect *all* federal prisons. By entrusting the case of Logue to the Nueces County jail, the employees of the jail became persons "acting on behalf of a federal agency" under the provisions of the Federal Tort Claims Act.

The United States Marshal in this instance asserted a great deal of authority and control over federal prisoners housed in the Nueces County jail. There was never an instance when the jailers did not defer to the instructions of the Marshal when a federal prisoner was involved. Although the Marshal did not have "control" in a legal sense over the internal functions of the jail he definitely was able to make any reasonable arrangements necessary to safeguard federal prisoners. This ability to assert control where federal prisoners were concerned had the same effect as if he had actually hired the jailers to carry out his duties and requirements for the protection of his prisoners. Accordingly, the Nueces County jailers were not employees of an independent contractor in the legal sense so as to insulate the United States from liability for their negligence.

In returning Logue to the Nueces County jail, knowing of his acutely psychotic condition the United States Marshal acted in violation of Texas law (Art. 5115, Tex.R.C.S.) as did the jailers in accepting him at the jail. Nor did the conditions under which he was incarcerated meet the standards of the statute for housing prisoners who may be dangerous to others. The contract between the United States and Nueces County, as it pertained to Reagan Logue, was invalid under Texas law to the extent of shielding the

United States from liability for the negligent acts of the Marshal and the employees of the jail.

Finally, if the decision of the United States Court of Appeals for the Fifth Circuit is allowed to stand federal prisoners located in non-federal institutions will be denied the remedies of the provisions of the Federal Tort Claims Act and the protection afforded by 28 U.S.C. § 4042. This could not have been the intent of Congress in enacting these statutes. In effect, even though they may not have been convicted of any crime, these federal prisoners will be denied the protection and remedies afforded other federal prisoners duly convicted and residing in federal institutions. This is additionally harsh as they may have no remedies against local jailers under local laws.

The totality of the circumstances in the instant case is such that common sense and reason dictate that the decision of the court of appeals be reversed. Logue's mental condition at the time was so extreme that it appeared to the Assistant United States Attorney in Laredo, 141 miles away, that Logue should be committed to a federal institution pursuant to 18 U.S.C. § 4244. The federal judge agreed. Had Logue been at Springfield under the same circumstances there would be no question as to the applicability of both the Federal Tort Claims Act and the duty of the United States Marshal to protect him. There should be no distinction merely because the Marshal, for his own convenience, chose to place him in the Nueces County jail, without making adequate arrangements for his supervision.

ARGUMENT

QUESTION (RESTATED)

This Case Presents the Issue of Whether the United States May Exempt Itself for Injuries Negligently Caused to a Federal Prisoner by Relinquishing Supervision over the Prisoner to a Local County Jail Pursuant to a Contract Providing for Housing Federal Prisoners in the Jail.

This Court held in *United States v. Muniz*, 374 U.S. 150 (1963) that federal prisoners were entitled to sue under the Federal Tort Claims Act for personal injuries sustained during confinement in federal institutions by reason of the negligence of government employees. The Court further held that such suits could be maintained regardless of whether the state law immunized jailers from such suit by their prisoners, since the duty of care owed by the government to federal prisoners is fixed by 18 U.S.C. § 4042, independent of any inconsistent state rule. *United States v. Muniz*, 374 U.S. at 163. The Court further noted that under the Act the government was not without defenses to suits by federal prisoners, but expressly declined to "... intimate any opinion upon their applicability to these complaints, since no such issue is presented for our review." *United States v. Muniz*, 374 U.S. at 163.

The district court in the case now before this court correctly found that the Deputy United States Marshal, knowing of Logue's propensity to attempt suicide, was negligent in not exercising reasonable care to provide for his protection by arranging for constant surveillance of Logue after removing him from the hospital; that the employees of the Nueces County jail, knowing of these serious suicidal tendencies, negligently failed to maintain an adequate surveillance of Logue while in the jail; and that the con-

tract between the United States and Nueces County for the housing of federal prisoners did not relieve the United States of its responsibility to Logue as a federal prisoner pursuant to 18 U.S.C. § 4042. (A. 607).

In reversing the trial court, the court of appeals specifically held *Muniz* was not applicable to a federal prisoner such as Logue.

The United States is subject to suit under the Federal Tort Claims Act for injuries suffered by federal prisoners confined in federal facilities. *United States v. Muniz*, 1963, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805. But we agree with the United States that *Muniz* does not extend to the situation now before us, where a federal prisoner is housed in a non-federal facility pursuant to Title 18, U.S.C., Section 4002. We interpret this section as fixing the status of the Nueces County jail as that of a "contractor". Title 18, U.S.C., Sec. 2671, footnote 2, *supra*. This insulates the United States from liability under the FTCA for the negligent acts or omissions of the jail's employees. We find no support in the record for holding that Deputy Marshal Bowers had any power or authority to control any of the internal functions of the Nueces County jail. The deputy marshal, accordingly, violated no duty of safekeeping with respect to the deceased. (A. 622).

a.

The United States is liable for damages under the Federal Tort Claims Act for injuries resulting from the negligence of its employee, the United States Marshal regardless of the negligence of the Nueces County jailers.

By its holding the United States Court of Appeals for the Fifth Circuit exonerated the United States not only from the negligence of the employees of Nueces County,

but also from the separate negligence of the United States Marshal, unquestionably the government's *own* employee. It is undisputed that 18 U.S.C. § 4042 explicitly charges the United States Marshal with the affirmative duty to provide for the safekeeping, care and protection of persons, like Reagan Logue, who are accused of a federal offense. (A. 625-626). It has not been contended that Logue's mental condition was such that another suicide attempt was unlikely; or that the Marshal lacked knowledge of his prisoner's serious suicidal tendency; or that the Marshal made any reasonably diligent effort to assure his prisoner's safety, care or protection by making adequate arrangements, under the circumstances, for his housing and supervision; or that if the Marshal had kept Logue in the hospital psychiatric unit, under his own custody, that the same tragic result would have occurred. The only reason advanced by the court of appeals in overturning the district court's finding of negligence on the part of the Marshal is its conclusion that there was no basis in the record for holding that he "had any power or authority to control any of the internal functions of the Nueces County jail." (A. 622).

As Chief Judge Brown in his dissenting opinion correctly points out, the Marshal's inability to control the internal functions of the jail is immaterial to his duty under 18 U.S.C. § 4042, to care for and protect federal prisoners.

Without initiating an extensive discourse on the state of the evidence—which seems to offer at least some tangible support for the theory that the Sheriff and his deputies were subject to the Marshal's control because they frequently complied with his informal instructions or suggestions—I need only point out that the question of the Marshal's authority to effect changes in the conditions of confinement is ac-

tually irrelevant here. The breach of the statutory duty of care occurred when Logue was confined under circumstances which the Marshal knew were inherently dangerous, in the absence of special precautions, regardless of what he may or may not have been empowered to do about the situation. Once the Government undertakes performance of an act entailing a duty of ordinary care it may not thereafter avoid liability under the Federal Tort Claims Act simply by abandoning the undertaking and attempting to attribute the responsibility to someone else. *Indian Towing Company v. United States*, 1955, 350 U.S. 61, 69, 76 S.Ct. 122,, 100 L.Ed. 48, 56; *United States v. Gavagan*, 5 Cir., 1960, 280 F.2d 319, cert. denied, 1961, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365.

Rather than providing for Logue's safety, the Marshal simply abandoned him, thus breaching the duty of care which, "in the case of a mental patient, * * * must be reasonably adapted and proportioned to his known suicidal, homicidal, or other like destructive tendencies." *United States v. Gray*, 10 Cir., 1952, 199 F.2d 239, 242. (A. 626-627).

The instant case presents a stronger argument for government liability than either *Indian Towing* or *Gray*, since here the United States was under a specific, statutory duty of care to *all* federal prisoners, regardless of their physical location at the time of injury—a factor obviously not within a prisoner's control. As Chief Judge Brown pointed out, in *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966):

... liability under the Act resulted from the Air Force's negligence in permitting a mentally deranged Airman to return to unrestricted duty and to draw from

the armory a pistol he subsequently used to kill his wife. There was no suggestion that liability was contingent upon the exercise of "authority" or "control" by the Government at the time of the shooting since liability arose only from the initial failure to utilize ordinary care. The same is true here—the Marshal's purported inability to arrange for the continuous observation of the prisoner does not excuse the *earlier* breach of the duty to provide a reasonably safe place of confinement. (A. 627).

The negligence imputed to the United States by the district court was that of its *own* employee in failing in his statutory duty to protect a federal prisoner, not the negligence of an independent contractor or its employees which, under certain circumstances invokes the exclusory provisions of 28 U.S.C. § 2671. (A. 631).¹ That the Federal Tort Claims Act by virtue of 28 U.S.C. § 2671 is evidence of the Congressional intent to retain to the United States the benefit of the traditional tort principle that an independent contractor is solely responsible *for his own torts* or that of its employees should not serve to expand this elementary principle by insulating the United States from the negligence of its employees in failing to perform a specific statutory duty, merely because Congress permits them to enter into contracts with third parties to house

1. The negligence of the employees of the Nueces County jail and the application of whether the jail was a "contractor" under 28 U.S.C. § 2671 so as to exonerate the United States from liability for their negligence as "employees of a federal agency" is discussed below. It is not, and should not be applicable to the negligent acts of the United States Marshal or his deputies, because they are clearly "employees of a federal agency" and not "contractors".

federal prisoners pursuant to 18 U.S.C. § 4002. (A. 634).² In fact, the common law rule shielding the employer (in this instance the United States) from liability for injuries caused to another by an act or omission of the contractor of his servants is subject to so many exceptions recognized in law that it is said that such is the general rule "only in the sense that it is applied where no good reason is found for departing from it."³

b.

The United States Marshal had a non-delegable duty to protect all federal prisoners by virtue of 28 U.S.C. § 4042 which imposes upon the United States liability under the Federal Tort Claims Act for the negligence of both its own employee, the United States Marshal and the employees of its contractor, the Nueces County jailers.

Where the injured party is a federal prisoner and the injury occurred as the result of both the negligence of the United States Marshal *and* local jailers, there are additional reasons in law why the rule should not apply. The Fifth Circuit Court of Appeals in holding that the negligence of the state jailer's failure to keep Logue under constant surveillance cannot be attributed to the United States because the jail was a "contractor" within the meaning of 18 U.S.C. § 2671, ignores the portion of that statute

2. The provisions of 18 U.S.C. § 4002 reflect that the intent of Congress was that local jails housing federal prisoners should be adequately guarded, sanitary and healthful. (A. 634). That statute has nothing to do with the duty to "(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042. (A. 633, emphasis added). Even prior to the enactment of these statutes United States Marshals have had the duty to protect federal prisoners. See, *Asher v. Cabell*, 50 F. 818, 827 (5th Cir. 1892).

3. Commentary, RESTATEMENT (SECOND) OF TORTS § 409 (1965) at 370.

relating to an "employee of the government" and conflicts with the decisions of the courts of appeal in *Witt v. United States*, 462 F.2d 1261 (2d Cir. 1972) and *Close v. United States*, 397 F.2d 686 (D.C. Cir. 1968).

That the United States and the Nueces County jail had in effect at the time of Logue's death a contract for the housing of federal prisoners is not the sole determinative issue regarding the liability of the United States for the negligence of the jail's employees. The Federal Tort Claims Act definition of an "employee of the government" includes not only "officers or employees of any federal agency," but also includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States whether with or without compensation." 28 U.S.C. § 2671. (A. 632). That the Nueces County jailers were acting as federal jailers *vis-a-vis* Reagan Logue is apparent from the record of the case. This was precisely the basis for the United States Court of Appeals for the District of Columbia Circuit holding the United States liable for an injury to a federal prisoner temporarily housed in the District's jail.

Since the Congress has clearly committed the custody of and safekeeping of federal prisoners upon conviction to the Attorney General, *then it must be true that in this instance the D. C. jailer was serving as the Attorney General's jailer*; and it must also be true, or at least it does not appear to the contrary in the record before us, that as to this federal prisoner, the Attorney General had some degree of power, commensurate with his continuous responsibility to supervise the D. C. jailer and his handling of this particular prisoner. We note in this regard that, for the purposes of the FTCA, Congress has defined "Employee of the [federal] government" as including "persons

acting on behalf of a federal agency in an official capacity, temporarily or permanently in the services of the United States, whether with or without compensation." 28 U.S.C. § 2671. *Close v. United States*, 397 F.2d at 687. (Emphasis added).

Similarly, the United States District Court for the Northern District of Iowa in *In re Morgan*, 80 F.Supp. 810 (N.D. Iowa 1948) stated that:

[w]hen a federal prisoner is placed in custody of a state jailer, such a jailer becomes, so far as the detention of that prisoner is concerned, a federal jailer or keeper. 80 F.Supp. at 817.

Citing the *Close* case, the Second Circuit recently held in *Witt v. United States*, that the United States was liable under the Federal Tort Claims Act for breach of its statutory duty of care to a federal military prisoner under 10 U.S.C. 951(c),⁴ even though the injury to the prisoner was caused solely by the negligence of a private person who had physical custody of the prisoner for purposes of having him perform work which the negligent party had contracted to do for a private association of military personnel.

The court rejected the government's argument that when the injured prisoner climbed into the contractor-tortfeasor's trailer, the responsibility of the United States for him stood at the curbside.

We take a different view. On the day of the accident, the Commandant of the Disciplinary Barracks had "custody of all offenders sent there" and was under a duty to "control and employ offenders as he considers best for their health and reformation . . .".

4. Formerly, 10 U.S.C. § 3661 (repealed 1968).

Such a duty may not be absolutely non-delegable, as Witt asserts, but in our view, the duty is an important and broad one. It should not be sidestepped simply by having McQuirk [the private tortfeasor] rather than a permanent employee or an enlisted man transport the prisoners and similarly the duty should not be affected because a particular work detail was "voluntarily" chosen in lieu of other regular work assignments. *Witt v. United States*, 462 F.2d at 1265.

As in *Close* and *Witt*, the United States was under an affirmative statutory duty in the instant case to care for and protect their prisoners. Petitioners submit that 18 U.S.C. § 4042 imposes an absolute, non-delegable duty that cannot be avoided by the relinquishment of supervision over a federal prisoner, especially where the person or governmental entity to which supervision is relinquished is clearly acting on behalf of the United States in an official capacity.⁵

The concept of non-delegable duty is a recognized exception to the rule that insulates employers from liability for acts or omissions of their contractors.

5. The Court should also note the decision of the Ninth Circuit in *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969) affirming the dismissal of a federal prisoner's cause of action based on 18 U.S.C. § 4042 against the county officials on the grounds that that statute created a cause of action only against the United States. On remand the district court held, as did the court of appeals in the instant case, that the United States could not be held liable for the negligence of the county officials, since the county was a "contractor". *Williams v. United States*, Civil No. 3241-SD-S, Southern District of California, April 1, 1971. Counsel for Petitioners herein has been informed that the appeal of that decision has been dismissed. For a case that questions the reasoning of the district court's opinion in *Williams*, see *Brown v. United States*, 342 F.Supp. 987, 997-998 (E.D. Ark. 1972), involving an injury to a federal prisoner while he was held in the Pulaski County Jail in Little Rock, Arkansas. The conditions in the Pulaski County Jail were held violative of the Eighth and Fourteenth Amendments in *Hamilton v. Love*, 328 F.Supp. 1182 (E.D. Ark. 1971).

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions. RESTATEMENT SECOND OF TORTS, § 424 (1965).⁶

While this is the law in Texas,⁷ and under 28 U.S.C. § 2674 the United States is to be judged as would a private individual under like circumstances, it is Petitioners' primary contention that under *federal law*, 18 U.S.C. § 4042, the duty of care and protection of federal prisoners is fixed on the United States and the United States should not be allowed to avoid that duty by simply substituting local jailers for United States Marshals pursuant to a contract.

As Chief Judge Brown pointed out regarding this case:

Moreover, when the Government decides that a particular individual should assume obligations and responsibilities virtually identical to those of a salaried Federal employee, there may very well be some persuasive basis for the suggestion that such an individual's breach of a specific statutory duty owed by the salaried employee to a specific class of person should visit identical liability upon the United States. *Obviously there is more than a subtle distinction between a "contractor" who breaches a duty of reasonable care*

6. Statutes that impose a duty to use reasonable care to provide safeguards or precautions (as opposed to statutes imposing an absolute duty) still subject the employer to liability if the contractor has failed to exercise such reasonable care. Commentary, RESTATEMENT (SECOND) OF TORTS, § 424 at 411-412 (1965).

7. See, *H. & G. N. R. R. Co. v. Meador*, 50 Tex. 77 (Tex.Sup. 1878); 30 Tex.Jur.2d *Independent Contractors* § 25 (1962).

owed to the world at large and a "contractor" who performs specific custodial functions that under a plain Congressional mandate would ordinarily entail a definite obligation of due care owed to a discrete (and particularly vulnerable) class of people. If only for the sake of uniformity and the avoidance of formalistic legal distinctions totally divorced from the realities of the situation, further consideration of the problem might inevitably lead to the conclusion that the Sheriff and his deputies were "employees" within the meaning of the Act, particularly in light of the principle that "the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." *United States v. Muniz*, 1963, 374 U.S. 150, 159, 83 S.Ct. 1850,, 10 L.Ed.2d 805, 813. As has long been recognized, "the Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Company*, 1951, 340 U.S. 543, 547, 71 S.Ct. 399,, 95 L.Ed. 523, 528. (A. 628-629, emphasis added).

c.

The degree of control which could be asserted by the United States Marshal, with the consent of the Nueces County jail, over federal prisoners in that jail was such that the jailers became servants of the United States and the United States is liable under the Federal Tort Claims Act for their negligence.

As regards the care and protection of Reagan Logue, the employees of the Nueces County jail were, in fact, acting as federal jailers and were subject to the actual control

of the United States Marshal. Regardless of the legal power, authority or right⁸ of the Marshal to control the internal functions of the Nueces County jail, it is clear from the record of this case that the Marshal at all times was able to exercise, with the full cooperation of the jail's employees, actual control so as to adequately provide for the care and protection of federal prisoners housed there. Unfortunately, in this instance, as the trial court properly found, the Marshal failed to exercise this prerogative and the result was Logue's death.

The County Jailer, Tom Lowrance, at the trial testified that whenever unusual circumstances arise regarding a federal prisoner, as in this case, it is the unwavering policy of the Nueces County jail to immediately contact the United States Marshal so that *he* can make the decisions as to how the situation is to be handled. (A. 437-438). Accordingly, when Logue made his first attempt at suicide by slashing his wrists, Lowrance immediately contacted the United States Marshal in Houston through the local federal probation office, and was instructed by them to place Logue in the hospital under guard until Deputy Marshal Bowers could be dispatched to Corpus Christi to take charge. (A. 96-97; 254-255; 322-324; 421). Before Logue was removed from the hospital back to the jail, Bowers'

8. "We find no support in the record for holding that Deputy Marshal Bowers had any authority or power to control any of the internal functions of the Nueces County Jail." (A. 622). This finding of the Court of Appeals obviously relates to the lack of legal authority on the part of the United States Marshals as federal officers to perform the functions of jailers in state facilities controlled by state statutes, not actual control, inasmuch as the United States on appeal did not seek to overturn the trial court's findings of negligence on the part of the Marshal as being "clearly erroneous". (See Appellant's Brief at p. 8). Rather, the government contended, and the panel in this case apparently agreed, that the United States Marshal had "no duty" to make specific arrangements for constant surveillance of Logue because it had "no power or authority to control any of the internal functions of the Nueces County Jail." (A. 622).

supervisor, Deputy Marshal Jones advised Lowrance in detail by telephone of the measures he wanted taken to ensure Logue's safety, including the inspection and stripping of the cell and surveillance of the prisoner by employees of the jail. (A. 383-384, 401, 408). Thereafter, Jones instructed Bowers to personally inspect the jail to see that the proper arrangements had been made pursuant to his instructions. (A. 385). Accordingly, Bowers did this (A. 333-335), and, presumably, was satisfied with what he saw. Deputy Marshal Jones testified that the Nueces County jail never refused his requests regarding the care of federal prisoners. (A. 405, 406). The fact that these precautionary instructions given by the United States Marshal to Lowrance amounted only to the standard measures ordinarily used by the jail, and were limited to merely placing Logue in a stripped cell without his clothing where he could be periodically observed by the jailers when they passed his cell (A. 435-448), is indicative of the negligence of the United States Marshal and the jailers, not of the degree of control the Marshal could have exercised over the jail to insure the prisoner's safety had he chosen to do so.⁹

Based upon this and the other evidence reflected in the record, the district court found that the failure of the

9. In light of the testimony regarding the close cooperation and willingness of the jail to accommodate the request of the Marshal regarding federal prisoners, there is no reason that the Marshal would not have been allowed to have a deputy or other federally-employed guard maintain a constant surveillance over Logue while in jail as the Marshal felt he was compelled to do at the hospital. (A. 331-332, 340, 341). Likewise, provision could have been made to at least approximate the relatively safe arrangements that existed in the hospital room. (A. 112). Clearly, the Marshal had no more or less authority to "control" the internal functions of the hospital than he did the jail. Just as the hospital deferred to the Marshal's arrangements to safeguard his prisoner, there is no justification to be drawn from the record that the jail would not do the same.

United States Marshal to make specific arrangements for the constant surveillance of Logue so as to ensure his safety, care and protection pursuant to 18 U.S.C. § 4042 constituted negligence. (A. 607).¹⁰ Both under Texas Law¹¹ and by federal statute, Reagan Logue as a prisoner was entitled to be protected by the United States Marshal. This duty was enhanced and its requirements made more stringent by the Marshal's full and complete knowledge of Logue's suicidal tendencies, and, inasmuch as the jail was willing to comply with the Marshal's instructions regarding federal prisoners, the Marshal was required to take reasonable precautions to prevent Logue from taking his own life while in jail. *Jones v. United States*, 399 F.2d 936, 941 (2d Cir. 1968); *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952); *Cohen v. United States*, 252 F.Supp. 679, 687-8 (N.D. Ga. 1966), *rev'd on other grounds*, 389 F.2d 689 (5th Cir. 1967); *Merchants Nat'l Bank & Trust Company of Fargo v. United States*, 272 F.Supp. 209 (N.D. 1967); *Arlington Heights Sanitarium v. Deaderick*, 272 S.W. 497 (Tex.Civ.App.—San Antonio 1925, no writ); cf., *Emelwon, Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968).

The facts above not only support the conclusion that the employees of the jail were "acting on behalf of a federal agency in an official capacity" as was found in *Close v. United States*, *supra*, but the same facts also make it clear that at least with regard to the care and safekeeping of Reagan Logue after his return to jail from the hospital, that the jailers were acting as the "servants" of the United

10. Even if no fault can be attributed to the United States Marshal in returning Logue to the jail until he could be transferred to the federal installation at Springfield, this duty at least obligated them to adequately inform the jailers of the necessity for his constant surveillance. *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966).

11. See, *Browning v. Graves*, 152 S.W.2d 515 (Tex.Civ.App.—Ft. Worth 1941, writ ref'd).

States Marshal and not as an "independent contractor." The main distinction between the independent contractor and the master-servant relationship is in the degree of control or right of control retained by the employer over the details of the work. *Strangi v. United States*, 211 F.2d 305, 307 (5th Cir. 1954). As seen above, the United States Marshal actually exercised a high degree of control over the details of Logue's reincarceration at the Nueces County jail. This control was entirely consistent with the master-servant relationship that had always existed between the Marshal and the jail with regard to the care and protection of federal prisoners, especially in emergency situations. Under the circumstances of this case, the jailers were not free of the control and influence of the United States Marshal and were, for want of a better description, its "loaned servants".¹² The fact that a contract¹³ existed between the United States and the Nueces County jail to keep prisoners should not be allowed to obscure the true, master-servant relationship between the parties at the time in question.¹⁴

12. See, *Fries v. United States*, 170 F.2d 726 (6th Cir. 1948), cert. denied, 336 U.S. 954 (1949); *Martarano v. United States*, 231 F.Supp. 805 (Nev. 1964).

13. The contract between the United States and Nueces County reflects that the County does not have exclusive custodial control of federal prisoners, but is subject to the laws of the United States, regulations of the Bureau of Prisons and instructions of the United States Marshal relating to those prisoners. (Pl. Ex. 5, A. 638-642).

14. See, *Schetter v. Housing Authority of the City of Erie*, 132 F.Supp. 149 (W.D. Pa. 1955).

d.

The reincarceration of Logue in the Nueces County jail was an illegal act under Texas law and the contract between the United States and Nueces County was invalid as it pertained to him, and accordingly, the United States is liable for the negligence of both its own employee, the United States Marshal and the employees of its contractor, Nueces County.

Insofar as the contract between the United States and Nueces County pertained to the detention of Reagan Logue after it was learned that he had been diagnosed as acutely psychotic and suicidal it was illegal under Texas law. Article 5115, Texas Revised Civil Statutes provides in pertinent part:

* * *

SUITABLE SEGREGATION

* * *

No person suspected of insanity, or who has been legally adjudged insane, shall be housed or held in a jail, except that such a person who demonstrates homicidal tendencies, and who must be restrained from committing acts of violence against other persons, may be held in a jail for a period of time not to exceed a total of seven (7) days. Furthermore, for such temporary holding of each person suspected of insanity, or who has been legally adjudged insane, there shall be provided a special enclosure or room, not less than (40) square feet and having a ceiling height of not less than eight (8) feet above the floor. Furthermore, the floor and the walls of such enclosure shall be provided with a soft covering designed to protect a violent person, temporarily held therein, from self-injury or destruction. One hammock, not less

than two (2) feet, three (3) inches wide and six (6) feet, three (3) inches long, made of elastic or fibrous material shall be provided in each such special enclosure.

* * *

Act July 22, 1876, p. 52; G. L. vol. 8, p. 888. Amended by Acts 1957, 55th Leg., p. 637, ch. 277, § 1.

There is no question that both the United States Marshal and the jailers knew of Logue's mental condition.¹⁵ It is inconceivable that the United States seeks to impose a contractual defense to an obviously illegal act once they knew of Logue's psychotic condition. It is axiomatic that an employer cannot contract for an illegal purpose and thereby shield himself from civil liability by reliance on the doctrine of independent contractor. *Moore & Savage v. Kopplin*, 135 S.W. 1033, 1036-1037 (Tex.Civ.App. 1911, writ ref'd).

The appointment of an agent to do an act is illegal if an agreement to do such an act would be criminal, tortious, or otherwise opposed to public policy. RESTATEMENT (SECOND) OF AGENCY, § 19 (1958).

An employer is subject to the same liability as his contractor for the consequences of the contractor's illegal conduct resulting from the employer's directions.¹⁶

Had the statute not been violated by reincarcerating Logue in the Nueces County jail, the second, and successful, attempt to destroy himself would have been avoided.

15. Dr. White testified that Logue "was mentally ill at the time: insane if you wish. He could not differentiate reality; he was actively hallucinating at the time." (A. 111).

16. See, *McDaniel Bros. v. Wilson*, 70 S.W.2d 618 (Tex.Civ. App.—Beaumont 1934, writ ref'd); RESTATEMENT (SECOND) OF AGENCY, § 212 (1958); cf. *Hatahley v. United States*, 351 U.S. 173 (1956); *Simons v. United States*, 413 F.2d 531 (5th Cir. 1969).

In not allowing recovery to federal prisoners incarcerated in non-federal institutions a non-congressional exception to the Federal Tort Claims Act is created and the congressionally-imposed duties imposed by 28 U.S.C. § 4042 as they relate to such prisoners are destroyed.

The decision of the Court of Appeals denying the Federal Tort Claims Act remedy to federal prisoners in state jails is clearly offensive to the principle announced by this Court in *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957), and reaffirmed in *United States v. Muniz*:

"There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *United States v. Muniz*, 374 U.S. 150, 166 (1963).

It would truly be anomalous if the court of appeals decision immunizing the United States from liability for injuries to its own prisoners to whom it owes a statutory duty of care is allowed to stand at a time when judicial impatience with the doctrine of sovereign immunity has led to its abrogation or dilution by judicial decision in state after state.¹⁷

17. See e.g., *Stone v. Arizona Highway Commission*, 381 P.2d 107 (Ariz. 1963); *Parish v. Pitts*, 429 S.W.2d 45 (Ark. 1968); *Muskopf v. Corning Hospital District*, 359 P.2d 457 (Cal. 1961); *Proffitt v. State of Colorado*, 482 P.2d 965 (Colo. 1971); *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957); *Smith v. Idaho*, 473 P.2d 937 (Idaho 1970); *Molitor v. Kaneland Community Unit District No. 302*, 163 N.E.2d 80 (Ill. 1959); *Campbell v. State*, 284 N.E.2d 733 (Ind. 1972); *Carroll v. Kittle*, 457 P.2d 21 (Kan. 1969); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); *Williams v. City of Detroit*, 11 N.W.2d 1 (Mich. 1961); *Spanel v. Mounds View School District*, 118 N.W.2d 795 (Minn 1962); *Brown v. City of Omaha*, 160 N.W.2d 805 (Neb. 1968); *Rice v. Clark County*, 382 P.2d 605 (Nev. 1963); *McAndrew v. Mularchuk*, 162 A.2d 820 (N.J. 1960); *Barker v. City of Santa Fe*, 136 P.2d 480 (N.M. 1943); *Becker v. Beaudoin*, 261 A.2d 896 (R.I. 1970); *Honaman v. City of Philadelphia*, 185 A. 750 (Pa. 1936); *Holytz v. City of Milwaukee*, 115 N.W.2d 618 (Wisc. 1962); see also, *Krause v. Ohio*, 274 N.E.2d 321 (1971), rev'd, 285 N.E.2d 736 (Ohio 1972), appeal filed, United States Supreme Court No. 72-589, October 10, 1972.

Under the provisions of 18 U.S.C. § 4042 the United States has the duty to provide for the safekeeping, care and protection of all persons charged with or convicted of offenses against the United States. The United States pursuant to Title 18 U.S.C. § 4002, solely for its own convenience, frequently houses federal prisoners in local jail facilities. The holding that the Section 4042 duty does not extend to federal prisoners housed in state facilities judicially creates a division of federal prisoners into two classes—those housed in federal facilities who will continue to enjoy the protection of the duty of 18 U.S.C. § 4042 and the remedy for its breach, and those temporarily located or about to be placed in non-federal facilities, who are now denied the benefit of this duty and its Federal Tort Claims Act remedy.

The district court specifically found that Deputy Marshal Bowers made no specific arrangements for constant surveillance of the prisoner, and that this was negligence. (A. 608). It found that this negligence was a proximate cause of his death. (A. 609). By reversing this holding, a federal prisoner in a state penal facility is arbitrarily denied his Federal Tort Claims Act remedy notwithstanding proof that a federal employee's negligence was a proximate cause of the injuries he sustained.

While the Fourteenth Amendment's equal protection clause does not specifically apply to acts of Congress or the federal government, the Supreme Court of the United States has held that federal classifications may be so unjustifiable as to be violative of due process. *Bolling v. Sharpe*, 347 U.S. 297 (1954). The District of Columbia Circuit Court of Appeals has held that the equal protection guaranty applies to the federal government through the Fifth Amendment.¹⁸

18. *Bolton v. Harris*, 395 F.2d 642, 645 n. 3 (D.C. Cir. 1968); *Lee v. Habib*, 424 F.2d 891, 898 note 21 (D.C. Cir. 1970).

The United States should not be permitted to abdicate its congressionally imposed duty to local jails simply because it is more convenient for the federal government to temporarily house federal prisoners in these jails, rather than building and staffing adequate federal facilities. Published statistics are unavailable, but it is estimated that the Bureau of Prisons has an average of 800 contracts with state and local jails to provide housing for federal prisoners.¹⁹ While these "contract jails" hold very few of the federal prisoners who have been tried and sentenced,²⁰ they hold the overwhelming majority of those who are "pre-trial detainees"—persons arrested and detained in connection with federal offenses. Again, published data is lacking, but the Bureau of Prisons estimates that on any given day there is an average of 4,000 unsentenced federal prisoners in non-federal facilities. This figure stands in sharp contrast to the number of unsentenced federal prisoners in federal facilities: 652 for the week ending August 10, 1971.²¹ With the dockets of the federal courts becoming increasingly more congested, there is little doubt that the number of unsentenced federal prisoners in local jails will steadily rise in the future. The point to be made, of course, is that the United States government has made the "contract jail" a necessary and apparently permanent part of the federal criminal justice system, and that the number

19. The statistics and estimates relating to federal prisoners and to the number of federal contracts with local jails were given to counsel for Petitioners by the Office of the General Counsel, Federal Bureau of Prisons. According to that office, however, the information was actually provided by the Bureau's Division of Community Services.

20. The number of sentenced federal prisoners in non-federal facilities in September, 1973, was reported to be only 246 (173 women, 33 men, and 40 juveniles).

21. See "Federal Prisoners Confined Week Ended 08/10/72", provided by the Federal Bureau of Prisons' Community Services Division through the Bureau's Office of General Counsel. (A. 635).

of persons affected by the decision to deny federal prisoners in those jails the right to the statutory duty of care of 18 U.S.C. § 4042 and the Federal Tort Claims Act remedy for its breach is substantial.

But there is a deeper, fundamentally moral reason why the Petitioners should prevail in this case, and that is that the conditions to which the federal government subjects its prisoners when it turns them over to local jails are, as a general rule, abhorrent. In case after case, both federal and state courts are finding that the treatment of prisoners in local jails violates basic standards of human decency.²² Overcrowding, inadequate supervision, no separa-

22. See e.g. *Brenneman v. Madigan*, 343 F.Supp. 128 (N.D. Cal. 1972) (Alameda County, California); *Hamilton v. Love*, 328 F.Supp. 1182 (E.D. Ark. 1971) (Pulaski County, Arkansas); *Jones v. Wittenberg*, 323 F.Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.*, *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972) (Lucas County, Ohio); *Hamilton v. Schiro*, 338 F.Supp. 1016 (E.D. La. 1970) (Orleans Parish, Louisiana). *Bryant v. Hendrick*, (Phila. C.P.) *aff'd*, 280 A.2d 110 (Pa. Sup. Ct. 1971). For a summary of the lower court opinion in *Bryant* see 7 Crim. L. Rep. 2463. See also *Jackson v. Hendrick*, (Phila. C.P. 1972) summarized in 40 U.S.L.W. 2710 (May 2, 1972), on appeal, No. 576CD 1972, in the Commonwealth Court of Pennsylvania.

Inquiries made of the attorneys for the plaintiffs in the foregoing cases revealed that federal prisoners are presently housed in Pulaski County Jail in Little Rock (*Hamilton v. Love*, *supra*), and in Orleans Parish Jail in New Orleans (*Hamilton v. Schiro*, *supra*), although they have been removed to an annex in the latter instance. Apparently as the result of the litigation in *Jones v. Wittenberg*, *supra*, the Lucas County Sheriff is presently refusing to accept federal prisoners in the Local County Jail, Toledo, Ohio. All federal prisoners are now housed in nearby Adrian, Michigan and transported to Toledo for federal court appearances. Despite the conditions found to exist in the Dallas County Jail (*Taylor v. Sterrett*, *infra*, note 20), federal prisoners are still kept in that facility. At the direction of the district court in *Brenneman v. Madigan*, *supra*, in March 1971, the U.S. Marshal stopped placing federal prisoners in the Greystone section of Alameda County's Santa Rita Rehabilitation Center. Improvements have been made in that facility, however, the federal prisoners are again housed therein. Federal prisoners were withdrawn from Holmesberg jail, Philadelphia County (*Bryant v. Hendrick*, *supra*), after the prisoner riot in July, 1970. Federal prisoners are still housed in Philadelphia's Detention Center and House of Correction (*Jackson v. Hendrick*, *supra*), although nearby state penal institutions are also used.

tion from dangerous and contagiously ill prisoners, substandard medical care, exposure to extreme temperatures, unsanitary kitchen and bathing facilities, and the risk of loss of life from fire are among the several outrages that the courts have found to constitute cruel and unusual punishment and a denial of due process and equal protection of the laws.²³ Such conditions are even more contemptible as they apply to those merely charged with crime, since the governmental interest in punishing criminal offenders, which might arguably justify some of the conditions found in the jails, is inapplicable to the treatment of persons whose guilt has not been proved.²⁴ As has been seen, the great bulk of the federal prisoners placed in these jails are in this category. According to the evidence developed in the instant case, the federal government does not require that its prisoners be separated from the state prisoners or

23. Recently, a federal district court in Texas held that the conditions in the Dallas County jail violated the Texas statute detailing the minimum requirements for "safe and suitable jails" in the state. *Taylor v. Sterrett*, 344 F.Supp. 411 (N.D. Tex. 1972). The plaintiffs also challenged the constitutionality of the conditions, but the court chose to base its decision on Article 5115, Texas Revised Civil Statutes. While the conditions of the Nueces County jail, where the prisoner in the instant case was held, have not been the subject of litigation, they are certainly no better than those in the Dallas County jail. For a description of current conditions in the Nueces County jail, see McKinney, *Nueces Facility—trying experience for jailed, jailers*, The Corpus Christi Caller-Times, October 1, 1972, § A, at 6, col. 5, noting, *inter alia*, the increased burden placed on the jail by the rising number of illegal aliens detained there by the federal government. (A. 636-637).

24. In *Hamilton v. Love*, 382 F.Supp. at 1191, the court noted that the lot of those detained while awaiting trial appeared to be worse than that of those convicted and serving their sentences in the Arkansas state penitentiaries. The full impact of this observation cannot be felt until it is remembered that conditions in the Arkansas state penitentiaries have been found to violate the Eighth Amendment. *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). For a discussion of the pretrial detainee problem see, Note, *Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails*, 21 Buff. L. Rev. 891 (1972); Note, *Constitutional Limitations on Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970).

that they be given any special treatment.²⁵ In short, the federal government each day relinquishes the supervision of thousands of persons whose guilt of any crime has not been established to local facilities which are woefully inadequate even for the state prisoners they must house. And, according to the United States Court of Appeals for the Fifth Circuit once the United States Government surrenders physical custody of a federal prisoner to such a facility it extinguishes its liability for whatever harm might befall that prisoner afterwards. As a matter of public policy and good conscience, this should not be the law.

In his opinion dissenting from the denial of rehearing en banc, in which Circuit Judges Goldberg and Wisdom joined, Chief Judge Brown posed the fundamental question in this case by way of analogy.

If a Deputy United States Marshal, after discovering a tubercular prisoner's critical physical condition, nevertheless decided to consign that individual to the custody of State authorities in a county jail without first determining whether the facilities provided adequate treatment for tuberculosis victims, and without even attempting to find out whether the conditions of confinement reasonably assured continued survival, I have difficulty believing that the Government's liability under the Federal Tort Claims Act for death resulting from lack of proper medical attention or from an unsanitary environment could be avoided with the bland assertion that the Marshal had no authority to convert the jail into a hospital. Since the facts of the present case are not materially different, I suggest that this serious and previously unresolved problem involving the care of Federal prisoners temporarily

25. (A. 386-387).

confined under contract with State officials is of sufficient importance to merit en banc reconsideration by the Court. (A. 625).

But again, it is the manifest unfairness of allowing the United States to stand immune to liability for injuries to federal prisoners in local lockups that compels that the court of appeals decision be reversed by this Court. And again, it is Chief Judge Brown that best makes the point.

Apart from the difficulties posed by this case in isolation, its implications within the broader context of modern-day prison administration are even more disturbing. Overcrowding and substandard physical facilities inevitably have a progressively detrimental impact on the administrator's ability to insure the health, safety and welfare of those in his custody. Increasingly we are being forced to confront undeniable evidence that the inmates of many institutions routinely subject other prisoners to varieties of subhuman treatment that no citizen of a civilized nation, whatever his transgression against society, should be compelled to endure. That such outrages are inflicted upon those serving sentences following conviction is disgraceful. But when the victim charged with a Federal offense is merely confined temporarily in a State jail while awaiting transfer or release on bond, I hardly think we provide an acceptable answer when we tell him or his family that restitution for death or injury resulting from his custodian's culpable neglect is unavailable because the responsible official was wearing a State rather than a Federal badge. In such circumstances I cannot concede that despite the constable's blunder the Government must go free. (A. 629-630).

CONCLUSION

WHEREFORE, premises considered, Petitioners respectfully pray that the decision of the United States Court of Appeals for the Fifth Circuit be reversed and judgment be entered against the United States in conformity with the judgment of the district court.

Respectfully submitted,

ORVAL C. LOGUE, ET AL., *Petitioners*

By: J. ROBERT MCKISSICK

JAMES DEANDA

EDWARDS & DEANDA

12th Floor, Wilson Building
Corpus Christi, Texas 78403

ED IDAR, JR.

Mexican-American Legal Defense
Fund

319 Aztec Building
211 East Commerce Street
San Antonio, Texas

MARIO OBLEDO

MICHAEL MENDELSON

Mexican-American Legal Defense
Fund

145 Ninth Street
San Francisco, California 94102

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing document were served upon the United States by depositing same in the United States post office, with air mail postage affixed thereto addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 23rd day of February, 1973.

J. ROBERT McKISSICK